In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 968

JOSEPH BUKOWSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was a member of the jury selected in the United States District Court for the Northern District of Illinois in the case of *United States* v. *Durovic*, which involved charges of fraudulent practices in the sale of Krebiozen. During that trial the jurors were repeatedly directed to refrain from reading written material about the case, to avoid discussing it among themselves or with others, and to inform the court immediately if some matter connected with the case came to their attention from an outside source.

On December 29, 1967, the United States Attorney filed a verified petition for a rule to show cause why

412-977—71

petitioner should not be held guilty of contempt for violations of these orders. The petition stated that, while sitting as a juror, petitioner read articles about Krebiozen printed in his union's publication "The Butcher Workman", attended a convention at which a proponent of Krebiozen spoke, discussed the articles and proceedings with other members of the jury and failed to bring these facts to the attention of the court. The rule to show cause was issued by the same judge who had presided at the *Durovic* trial. After a jury trial before that judge, petitioner was convicted and sentenced to imprisonment for three years.

The court of appeals affirmed the conviction but reduced the sentence to eighteen months. Its thorough opinion sets forth in detail the evidence on which the conviction rests and discusses, with one exception, each of the numerous contentions raised by petitioner in that court and reiterated here.

The only issue not dealt with below is the contention that the trial court's instruction, requiring any juror exposed to publicity to "report the matter to me," sought to compel petitioner to give evidence against himself in violation of the Fifth Amendment. Citing *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, petitioner contends that his failure to inform the judge could not serve as part of the basis for a finding of contempt. (Pet. 20–25.) However, this point was never raised in the courts below.[1] Petitioner's failure to in-

[1] See *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16.

voke the Fifth Amendment in a timely fashion cannot be excused on the basis set forth in *Grosso*, 390 U.S. at 70–72, because both his response to and trial on the contempt charges occurred well after *Marchetti* and *Grosso* were decided.

Moreover, there is no substance to the self-incrimination argument in this context. If petitioner's exposure to publicity about Krebiozen was inadvertent, disclosing this to the judge would not have been incriminating. And it makes no sense to say that a juror who inadvertently becomes exposed to publicity must tell the judge but one who intentionally exposes himself need not. In either situation the integrity of the trial process and fairness to the parties requires that the court be made aware of any threat to jury impartiality. Since jurors would not be expected to violate a judge's orders, the instruction here was not aimed at one "inherently suspect of criminal activities," 390 U.S. at 68, and does not fall within the ambit of *Marchetti* and *Grosso*.

Petitioner's other contentions are answered in the opinion of the court of appeals. Of course, with respect to the claim that the prosecution should have been instituted by indictment, this Court is not bound by the holding in *Green* v. *United States*, 356 U.S. 165, 183–187, to the same extent as the court of appeals considered itself bound. Nevertheless, for the reasons set forth in the opinion below, there is, we suggest no reason to reconsider the *Green* ruling. While the decisions in *Bloom* v. *Illinois*, 391 U.S. 194, and *Cheff* v. *Schnackenberg*, 384 U.S. 373, as-

similated criminal contempt to ordinary crimes for the purpose of adjudicating whether punishment of more than six months could be imposed, criminal contempt does, for constitutional purposes, remain *sui generis* because of its intimate relationship to the proper functioning of the judicial process. Since such a prosecution involves the inherent power of courts to enforce their orders, it is proper that a court make the initial determination whether there is probable cause to believe that its orders have been violated.

It is respectfully submitted that the petition for a writ of certiorari should therefore be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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